

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| -----X | |
| DAVID E. KAPLAN, et al., Individually and on | : |
| Behalf of All Others Similarly Situated, | : |
| | No. 12 Civ. 9350 (VM) (KNF) |
| Plaintiffs, | : |
| | <u>ECF CASE</u> |
| - against - | : |
| | : |
| S.A.C. CAPITAL ADVISORS, L.P., et al., | : <u>ORAL ARGUMENT REQUESTED</u> |
| Defendants. | : |
| | : |
| -----X | |
| BIRMINGHAM RETIREMENT AND RELIEF | : |
| SYSTEM, et al., Individually and on Behalf of All | : |
| Others Similarly Situated, | No. 13 Civ. 2459 (VM) (KNF) |
| | : |
| Plaintiffs, | <u>ECF CASE</u> |
| | : |
| - against - | : |
| | : |
| S.A.C. CAPITAL ADVISORS, L.P., et al., | : <u>ORAL ARGUMENT REQUESTED</u> |
| Defendants. | : |
| | : |
| -----X | |

**PLAINTIFFS' RESPONSE TO DEFENDANT SIDNEY
GILMAN'S JOINDER IN MOTION TO DISMISS THE JOINT
CONSOLIDATED AMENDED CLASS ACTION COMPLAINT**

Lead Plaintiffs in Case No. 12 Civ. 9350, David E. Kaplan, Michael S. Allen, Chi-Pin Hsu, Gary W. Muensterman and Fred M. Ross, and Lead Plaintiffs in Case No. 13 Civ. 2459, City of Birmingham Retirement and Relief System and KBC Asset Management NV, respectfully submit this response to Defendant Sidney Gilman's Joinder in Motion to Dismiss the Joint Consolidated Amended Class Action Complaint [ECF No. 132] (the "Joinder").

In addition to joining in the Motion to Dismiss the Joint Consolidated Amended Class Action Complaint filed by the SAC defendants [ECF No. 129] (the "SAC Motion"), the Joinder argues that the Joint Consolidated Amended Class Action Complaint should be dismissed as

against Dr. Gilman because he has made full disgorgement and the Court, he argues, has discretion regarding the imposition of joint and several liability. Joinder at 2, 4. The cases Dr. Gilman cites, however, *SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319 (S.D.N.Y. 2007), and *SEC v. Falbo*, 14 F. Supp. 2d 508 (S.D.N.Y. 1998), did not involve the operative statute here, Section 20A of the Securities Exchange Act of 1934 (“Section 20A”), 15 U.S.C. § 78t-1. Section 20A contains a provision, subsection (c), that expressly addresses tipper liability. It provides:

(c) Joint and several liability for communicating

Any person who violates any provision of this chapter or the rules or regulations thereunder by communicating material, nonpublic information ***shall be jointly and severally liable under subsection (a) of this section*** with, and to the same extent as, any person or persons liable under subsection (a) of this section to whom the communication was directed.

(Emphasis added.)

This provision is mandatory, and Section 20A’s legislative history shows that it was intended to strike a balance with respect to deterrence, explaining:

The legislation provides that persons who violate the law by communicating information shall be liable in the new express action for contemporaneous trades jointly and severally with, and to the same extent as, persons ‘to whom the communication was directed.’ This language, which parallels that used in the penalty provisions of the bill, ensures that the communicator would not be subject to potential liability for the profits gained or losses avoided by all persons who may have ultimately learned of the information. This provision is intended to ensure that the potential liability of communicators is not so enormous that it would chill legitimate communication.

H.R. Rep. No. 100-910 (1988), *available at* 1988 WL 1096434, at *19.

Accordingly, the Court should not further restrict the liability expressly imposed by statute. In addition, any assessment of the equities, were one warranted, should await full factual development, as occurred in *Opulentica*, 479 F. Supp. 2d at 322 (ruling on motion for summary judgment), and *Falbo*, 14 F. Supp. 2d at 517 (same).

For the foregoing reasons and for those set forth in Plaintiffs' memorandum of law in opposition to the SAC Motion, the Court should deny Dr. Gilman's Joinder in its entirety.

Dated: New York, New York
June 9, 2014

Respectfully submitted,

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